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**U.S. Department of Labor**
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

DATE: Apr 12 1989
CASE NO. 89-ERA-00015

IN THE MATTER OF

LEE H. ST. LAURENT
Complainant

v.

BRITZ INC.; HYDRO NUCLEAR SERVICES, INC., AND OMAHA PUBLIC POWER DISTRICT
Respondents

Michael Mulligan, Esquire
For Complainant

Wayne Britz, *pro se*
For Respondent Britz, Inc.

Richard Cooper, Esquire
For Respondent Hydro Nuclear Services, Inc.

George C. Rozmarin, Esquire
For Respondent Omaha Public Power District

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED
DECISION AND ORDER

On September 29, 1988, Complainant filed a complaint (ALJ 1)[1] pursuant to 29 CFR 24.3 alleging that Respondents violated the provisions of the Energy Reorganization Act of 1974, 42 U.S.C.

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[Page 2]

Sec. 5851(a) (hereinafter the "Act").

By letter dated December 22, 1988,[2] , the United States Department of Labor informed Complainant that its investigation of his complaint disclosed insufficient evidence to support the alleged violation (ALJ 1).

By telegram dated December 29, 1988 (ALJ 2), Complainant requested a bearing pursuant to 29 CFR 24.4(d)(2)(i).

A hearing was held in Camden, New Jersey on January 17, 1989. Post-hearing briefs were filed by the parties pursuant to the Briefing Schedule Order entered on February 23, 1989.

At the hearing, all parties agreed to a qualified waiver of the decisional time requirements provided at 42 U.S.C. 5851(b)(2)(A) and 29 CFR 24.6(a) and (b).[3]

## THE LAW

42 U.S.C. 5851(a) reads as follows:

> Employee protection
> (a) Discrimination against employee No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C.A. § 2011 et. seq.), or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;

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> [Page 3]
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C.A. § 2011 et. seq.).

Under this statute, it must be proven: (1) that the party charged with discrimination is an employer subject to the Act: (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and (3) that the alleged discrimination arose because the employee commenced or was about to commence, testified or was about to testify, assisted, participated, or was about to assist or participate in any proceeding, or in any other action to carry out the purposes of 42 U.S.C. § 5851 (Energy Reorganization Act) or 42 U.S.C. § 2011 (Atomic Energy Act). See, *DeFord v. Secretary of Labor*, 700 F. 2d 281, 286 (6th Cir. 1983).

As to element (3) above, that is, employee conduct constituting activity protected under the Act, the Secretary of Labor has made it clear that the reporting of safety and quality concerns internally to an employer is protected activity.[4]

COMPLAINANT'S CASE

The gravamen of Complainant's complaint is that Respondents fired him because he pointed out safety hazards existing at the Fort Calhoun nuclear power plant (Tr. 11, 47, 51, 75).

Complainant established through his testimony and that of Wayne Britz (hereinafter "Britz" who for all intents and purposes is Respondent Britz Inc.) that he was asked by Britz to perform "surveillance activities" at the power plant which he understood to include the making of observations and recommendations relative to radiation control practices (Tr. 29). Britz explained his employment arrangement with Complainant in terms of remuneration (Tr. 77), and job term-length (Tr. 79). All parties stipulated to the length of Complainant's work-week at 50 hours (Tr. 79). The specific safety hazards raised by Complainant and his recommendations attendant thereto included: a) overcrowding at radiologically controlled areas (control point) - Complainant recommended that certain activities be moved inside the controlled area to reduce congestion (Tr. 31, 32, 57,

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58); b) eating at areas where contaminated clothing was stored - It appears that Complainant recommended that the practice be terminated and/or that signs prohibiting the practice be posted (Tr. 34, 59, C-1); and c) poor control over radiation work permits - Complainant evidently recommended that existing procedures for control be complied with (Tr. 33, C-1).

Complainant suggests also that his dismissal was in part generated as a result of his criticism of an idea advanced by Tony Christensen (a Field Health Physicist employed by Respondent Omaha Public Power District - hereinafter "Power") to incorporate certain newly revised procedures into Power's Radiation Protection Manual, the substance of

which idea had been previously criticized by the Nuclear Regulatory Commission (hereinafter "NRC") (C-3, Tr. 46, 48, Compl. Post-Trial Brief, at pg. 4).

Complainant was, sometime in late September, 1988, informed by Britz that he was fired because of an "interface problem with the plant [Power] staff", and that Donald Neely (Manager, Engineering for Respondent Hydro Nuclear Services, Inc.-hereinafter "Hydro") wanted him "removed from the project" (Tr. 47, 48). Thereafter, Complainant met with Britz, James Ferguson (site manager for Hydro), John Bobba (radiation protection supervisor for Power), and Gary Gates (plant manager for Power), at which time he was advised that he had been fired because Neely didn't think he was a "team player" (Tr. 49, 50).

## BRITZ'S DEFENSE

Essentially, Britz[5] maintains that he did not fire Complainant, but simply followed Hydro's order to do so. Britz also emphasizes that he personally would not have fired Complainant in the circumstances (Tr. 80).

## HYDRO'S DEFENSE

Hydro argues first, that it was never an "employer" of Complainant, and thus the provisions of the Act do not apply to it. Second, Hydro suggests that the activity Complainant advances as that which formed the basis of the improper discharge, i.e., internal reporting, is not one covered by the Act. Finally, Hydro asserts that Complainant was fired for (appropriate) reasons other than those advanced by Complainant, that is, because he could not get along with Power staff and was insubordinate vis a vis his Hydro superior, Neely.

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[Page 5]

Through its witnesses, Neely and Ferguson, Hydro established that in early September, 1988[6] , Bobba had begun raising questions concerning Complainant's performance relative to "interfacing" problems with Power[7] staff (Tr. 91, 97, 112, 114, 115, 116, 118). Also, Bobba criticized Complainant's failure to check standing orders and procedures before issuing new ones (Tr. 113). The decision to dismiss complainant was made by Neely[8] in consultation with Ferguson. (Tr. 116). The stated reasons for dismissal were the noted interfacing problems together with Complainant's insubordinate failure to revise a particular procedure despite Neely's personal direction to do so (Tr. 92, 93, 94, 116, 117, 118). Ferguson testified that these interfacing problems were called to the attention of Complainant prior to the actual dismissal date of September 28, 1988 (Tr. 113, 116) at which time Britz was directed to terminate Complainant (Tr. 119).[9]

## POWER'S DEFENSE

Power advances exactly the same defenses as put forward by Hydro, *supra*, along with the insistence that it had nothing to do with the dismissal of Complainant.

Christensen testified on its behalf that, in early September, 1988, he began experiencing "problems" with Complainant (Tr. 140, 141). These took the form of Complainant's apparently inappropriate urging of the substitution in a procedure of new symbols with which Power personnel were not familiar (Tr. 142); of Complainant becoming upset at a directive by Bobba regarding certain supplemental instructions (Tr. 145); of Complainant's apparent avoidance of responsibility to conform existing orders with new procedures (Tr. 146); and of Complainant's apparent displeasure with Bobba's directive to him to better define a term appearing in a particular procedure (Tr. 148, 149).

Christensen also explained (Tr. 151, 152) his notes (P-1) relative to the action he took corrective of certain deficiencies earlier raised by Complainant (C-1), and indicated that neither he nor anyone associated with Power directed that Complainant be dismissed (159, 160).

## ISSUES

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[Page 6]

1) Whether Respondents, Hydro and/or Power, are employers under the Act.
2) Whether Complainant engaged in activity protected under the Act.
3) Whether Complainant was discharged as a result of such protected activity.

## FINDINGS AND CONCLUSIONS

### I. EMPLOYER ISSUE

While unnecessary in light of the finding at Discharge Issue, *infra*, this issue is treated for the sake of judicial economy and avoidance of a possible remand in the event of a reversal on that issue.

Complainant worked under the direction of Hydro, and Hydro was the entity to which Complainant reported, and was responsible (C-1 thru C-2(c), C-3; Tr. 33, 65, 67, 68, 69, 70, 75, 91, 92, 112). Hydro involved itself in the discussions surrounding the hiring of Complainant (Tr. 85, 90, 91), made the decision to discharge him (Tr. 92, 104, 105, 118), and directed Britz to fire him (Tr. 20, 118, 119).

Power controlled throughout, who was allowed on the station site (Tr. 83), and its suggestion to Hydro that "...something [be done] about his [Complainant's] performance", was understood to include, in alternative part, the dismissal of Complainant (Tr. 135). Hydro was understandably sensitive to the wishes of Power, as Power was its client which retained it, as counsultant-contractor, to enhance the existing radiation protection program at the Fort Calhoun Station (Tr. 88, 89).

On the other hand, Power never specifically directed that Complainant be fired (Tr. 109, 159, 160). Furthermore, Britz regards himself and Complainant to be independent

contractors (Tr. 83), wage taxes were not withheld from his paycheck (ALJ 1, at 8, 9), and there is no evidence that any traditional employer-provided benefits were enjoyed by Complainant.

The Act does not define the terms "employer" and "employee",[10] (a)

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[Page 7]

and there does not appear to be any circuit case law specifically dealing with this definitional issue under the Act. Thus, we are left with application of the common law agency test which permits, under the facts of this case, a finding that Respondents Power and Hydro[10] (b) were employers, and Complainant their employee. On balance, indicia sufficient to impose common law employer status upon these Respondents (see ftn. 12, *infra*,), appears in this record, as the facts demonstrate the existence of the right and exercise of control over the service being performed by Complainant, whose work relationship with these Respondents left him little room for autonomy and independence.

Totally apart from traditional common law concepts, it has been held that:

> "[The] term ["employee"]...must be understood with reference to the purpose of the Act..." *NLRB v. Hearst Publications*, 322 U.S. 111 (1944),

and, that:

> "It will avail us little to consider...the common law...[when]...dealing...with a specific statute which...is of a class of regulatory statutes designed to implement a public; social, or economic policy through remedies not only unknown to common law but often in derogation of it." *Walling v. American Needlecrafts*, 139 F.2d. 60 (6 Cir., 1943).
> See also, *United States v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

The purpose of the Act is to prevent discouragement or intimidation from cooperation with the NRC, i.e., preventing the drying up of "channels of information", by ensuring job-related protections. Thus, "the need for broad construction of the statutory purpose...". *DeFord v. Sectry*, supra.

Power and Hydro were clearly in a position to defeat the purpose of the Act by discouraging and/or intimidating Complainant from reporting nuclear hazards affecting the environment, the general public, and workers at the station. Each, as clearly, were positioned to impact upon the alleged occurrence of discriminatory action against

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[Page 8]

Complainant. To include regular-permanent personnel of Power and/or Hydro within the Act's protected class, and exclude the incidental Complainant-type worker, for these reasons alone, subverts the objective of the Act especially where, as in this case[11] , there is evidence of prevailing industry practice to retain consultant personnel on a sporatic basis to supplement a regular work force for certain tasks (the "outage" in this case). See also, *Royce v. Bechtel Corp*., 83 ERA 3 (1985); *Faulkner v. Olin Corp*., 85 SWD 3 (1985).

I find that Respondents Power and Hydro are employers under the Act.[12]

## II. PROTECTED ACTIVITY ISSUE

That internal reporting of safety and quality concerns constitutes a protected activity under the Act, is firmly established, see ftn 4/ *supra*.

The behavior of Complainant alleged to have triggered his dismissal, i.e., his reporting to Hydro and Power of unsafe conditions and his criticism of a proposal by a Power employee considered by him to be violative of NRC mandate, if proven, would clearly fall within the Act's protection.

I find that Complainant engaged in activities protected under the Act.

## III. DISCHARGE ISSUE

It is Complainant's burden to prove he was discharged because he engaged in protected activities, *DeFord v. Secretary of Labor, supra.*

Complainant offers no direct evidence to carry his burden, but urges that the facts circumstantially provide the necessary quantum of proof.

He presents the scenario of recurring expression to management of his observations of (what in his opinion constitute) uncorrected and ongoing safety hazards[13] at a time when the station was on shaky

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grounds with the NRC, climaxing in a particular episode, i.e., his memo directly challenging a Power supervisor (C-3), which he speculates "broke the camel's back" relative to his continued stay at the station.

This scenario begins to break down, however, upon review of management's reactions to Complainant's repeated attempts to change conditions at the station. Complainant's recommendations relative to reduction of the overcrowding at the control point, better control of radiation work permits (RWP), and minimization of food contamination risks, were, for one thing, all rationally addressed by management. Christensen cogently

explained his position that implementation of Complainant's idea to move the sign-in desk into the controlled area may have violated Power's existing procedures in this regard (Tr. 154). Complainant's list of apparent RWP irregularities (C-1), was investigated and action taken thereon (Tr. 152, P-1). By Complainant's own admission (Tr. 36), Bobba "...dispatched [someone] to straighten things out" relative to the food contamination problem. Moreover, Complainant's warning about Christensen's (Power Manual incorporation) idea (C-3) was heeded by management, and Complainant prevailed, with Christensen's idea being rejected by Bobba (Tr. 56, 147).

While, in and of itself, (at least arguably) rational management reaction to the reporting of safety concerns does not negate the occurrence of discriminatory discharge under the Act, such reaction detracts somewhat from the circumstantial value of Complainant's case. Complainant has established that he was doing his job of pointing out hazards and that management did not always take his advice. This does not make a case under the Act.[14] The Act nowhere requires that management accept his recommendations, but Complainant's case seems to suggest that it does. The hollow logic of Complainant's case is manifested in his proposition: that he did his job (engaged in the protected activity), but he was fired, therefore, he was fired for doing his job (engaging in the protected activity)!

Complainant fails to establish, inferentially by circumstantial evidence or otherwise, a factually-sound connection[15] between his dismissal and his pointing out of safety hazards.

On the other hand, and as important, the record facts establish that complainant was discharged for reasons other than the pointing

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out of safety hazards. Neely, Ferguson and Christensen (corroboratively of one other) credibly related Complainant's manifest inability[16] to deal sensitively with Power personnel, despite his having been previously instructed as to the importance thereof (Tr. 113, 116). It is noted that Complainant never denied using obviously offensive language in describing certain Power personnel. Also noted is Complainant's less than complete disclosure of "interfacing" problems at previous work sites.[17]

I find that the record evidence fails to establish that Complainant was dismissed[18] because of his protected activity, and that such evidence establishes that he was discharged for appropriate, legitimate reasons other than his engaging in protected activity.

## RECOMMENDED ORDER

On the basis of the foregoing, I recommend that the complaint be dismissed.

RALPH A. ROMANO
Administrative Law Judge

**[ENDNOTES]**

[1]References herein are as follows: "ALJ" - Administrative Law Judge Exhibits, "C" - Complainant Exhibits, "H" - Respondent Hydro Nuclear Services, Inc. Exhibits, "P" - Respondent Omaha Public Power District Exhibits, "Tr." - transcript.

[2]Outside the 30 day requirement of 42 U.S.C. 5851(b)(2)(A) and 29 CFR 24.4(d)(1).

[3]The Administrative Law Judge decision to be entered within 90 days of the filing of briefs, and the Secretary of Labor's final order, within 90 days of the ALJ decision (Tr. 164, 165).

[4]*Priest v. Baldwin Assocs*, 84 ERA 30 (6/11/86); *Willy v. Coastal Corp*, 85 CAA1 (6/4/87), adopting the Ninth and Tenth Circuit rational in *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (April 29, 1983), *aff'd and remanded*, 735 F.2d 1159 (9th Cir. 1984), and *Wells v. Kansas Gas and Electric Co.*, Case No. 83-ERA-12 (June 14, 1984), *aff'd sub nom Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 3311 (1986); as against the decision reached in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), absent resolution of this circuit conflict by the U.S. Supreme Court.

[5]Wayne Britz was not represented by counsel at trial.

[6]Complainant had arrived at the Fort Calhoun station sometime in mid-August, 1988 (Tr. 90).

[7]Hydro's client, to which it was responsible.

[8]To whom Ferguson reported (Tr. 92).

[9]Hydro's counsel stipulated that Hydro instructed Britz to dismiss Complainant (Tr. 20).

[10](a) Whether the phrase "No employer, including a Commission license...or a contractor or a subcontractor of a Commission license..." may itself and by its own terms be interpreted as rendering all such entities "employers", is an interesting semantic question.

[10](b)Hydro's assertion that Complainant was discharged due to his "insubordination" to Hydro's Neely, somewhat itself refutes its denial of employer status.

[11]Tr. pgg. 83, 84, 88.

[12]As regards Respondent Britz, who initially retained Complainant, paid his salary (Tr. 13, 82), and informed him that he was terminated (Tr. 47)), while he does not raise this

defense, I would have found him also to be Complainant's employer based upon the same rationale as that underlying Respondents Power and Hydro.

[13]Hydro's position that, since the substance of Complainant's observations were already exposed and widely known, and since it was Complainant's specified job function to report these hazards, he could not have been fired because of such reporting, is unavailing. It has been held that one who is paid to report violations is protected by the Act, *Murphy v. Consolidated Coal Co*., 82 ERA 4, 83 ERA 4, and that it is not necessary to prove that employer attempted to hide unique information in order to make out a case under 42 USC 5851, *De Ford v. Secretary of Labor, supra*. At any rate, Complainant testified without contradiction that his reporting duties included the reporting of previously reported violations which continued uncorrected (Tr. 157).

[14]Nor, for that matter, does proof that Complainant was doing his reporting job well ("...[calling] a spade a spade," Tr. 103), standing alone, prove that he was fired for doing his reporting job well.

[15]For instance, some evidence challenging Ferguson's statement that Complainant's reports were never discussed in connection with his discharge (Tr. 120). A diligent search of the trial record of Complainant's proof in this regard evokes the recently popularized query "Where's the beef?".

[16]Through language and overall disposition (Tr. 116, 97, 130, 142, 145, 149).

[17]Compare Complainant's testimony at Tr. pg. 53 against Britz's testimony at Tr. 83, 84, 85.

[18]As regards Respondent Britz, I find that the evidence abundantly demonstrates that he did not dismiss Complainant. His stated defense is therefore entirely sustainable.